Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1974

No. 74-1620

BRENDAN SULLIVAN,

Petitioner

-vs.-

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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No. 74-

BRENDAN SULLIVAN,

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-vs.-

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Brendan Sullivan (herein Sullivan, or the petitioner) respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in this proceeding on March 24, 1975 (App. pp. A-13–A14).

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York, not yet reported, appears in the appendix hereto. (App. pp. A-13–A-14). No opinion was rendered by the Appellate Division of the New York State Supreme Court. A copy of the Order of said Court appears in the Appendix at pp. A-10-A11. The opinion of the New York State Supreme Court, the trial court, was issued on June 5, 1973 (App. pp. A-9).

JURISDICTION

The opinion and judgment of the Court of Appeals of the State of New York was issued on March 24, 1975 and this petition for certiorari was filed within ninety (90) days of that date. The jurisdiction of this court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Was petitioner denied the due process of law guaranteed under the XIV amendment to United States Constitution when he was terminated from his position with the New York City Department of Social Services without any hearing and without an opportunity to defend the charges made against him?

2. Did the "hearing" accorded the petitioner some 13 months after he was denied his Civil Service position remedy the previous denials of the due process standards of the XIV amendment to the United States Constitution when the "hearing" was conducted at a time when the petitioner was still not restored to the status denied him in an unconstitutional manner and was conducted by a body which had no jurisdiction over him and which "tried" him on charges unrelated to the previous allegations made against him?

Constitutional Provisions and Statutes Involved

United States Constitution Amendment XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Civil Service Law §75:

> §75. REMOVAL AND OTHER DISCIPLINARY ACTION

1. Removal and other disciplinary action. A person described in paragraph (a), or paragraph (b), or paragraph (c), or paragraph (d) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

(a) A person holding a position by permanent appointment in the competitive class of the classified civil service, or ...

2. Procedure. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose. In case a deputy or other person is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such office or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, and shall allow him to summon witnesses in his behalf. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Compliance with technical rules of evidence shall not be required.

3. Suspension pending determination of charges; penalties. Pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for a period not exceeding thirty days. If such officer or employee is found guilty of the charges, the penalty or punishment may consist of a reprimand, a fine not to exceed one hundred dollars to be deducted from the salary or wages of such officer or employee, suspension without pay for a period not exceeding two months, demotion in grade and title, or dismissal from the service; provided, however, that the time during which an officer or employee is suspended without pay may be considered as part of the penalty....

New York City Civil Service Commission Rules and Regulations Rule 6.4.6.

When an employee absents himself without leave and fails to communicate with his department in the manner prescribed by his department for a period of twenty consecutive work days, such absence shall be deemed to constitute a resignation effective on the date of its commencement unless the appointing officer, in his discretion, sees fit to accept an explanation for such unauthorized absence.

STATEMENT OF THE CASE

This case presents a significant question involving the application of the Due Process Clause of the 14th Amendment of the United States Constitution to the procedures followed by the City of New York when removing permanent Civil Service employees from their positions. While the instant case involves the trial and tribulations of only one individual its effect directly relates to the Constitutional rights of literally hundreds of thousands of employees who are subject to the Civil Service Rules of the City of New York.

Petitioner, Brendan Sullivan, was employed by the Department of Social Services on February 7, 1966 in the title of caseworker in the Competitive Classified Civil Service of the City of New York. He continued in that capacity until his employment was terminated by the respondent as hereinafter described.

From February 7, 1966 until October 26, 1971, a period of more than five years, Mr. Sullivan was assigned to the Veteran's Assistance Social Service Center Office where he successfully performed his duties. Mr. Sullivan's work was considered good, and his supervisor had no complaints about its quality.

On October 26, 1971 Mr. Sullivan was stricken with a severe attack of colitis, blepharitis and nervosa anorexia, incapacitating illnesses which caused the Petitioner to suffer diarrhea, nausea, nervous tremors and loss of weight. At the time, Mr. Sullivan was sixty years of age.

On the very day he was stricken, he telephoned a co-worker in his office, informed him of the nature of his illness, and requested that he communicate with the supervisor. On three separate occasions between October 26 and November 15, 1971, he telephoned Mrs. D. L. Omansky in the Office of the Division

of Personnel Relations of the Department of Social Services of the City of New York, informed her of his incapacity, and requested medical leave, in accordance with standard departmental procedure. On November 15, 1971, 19 days after the onset of Mr. Sullivan's illness, Mr. Sullivan called his supervisor, Louis G. Gaspari, and the director of the Veteran's Assistance Center, Edward J. Marchasi, explained his medical incapacity, and requested a medical leave of absence.

On December 23, 1971, less than two months after the onset of Mr. Sullivan's illness, Ralph Lichtenstein, Acting Director of respondent's Bureau of Personnel Administration, wrote a letter to Mr. Sullivan stating that, because Mr. Sullivan allegedly failed to keep an appointment with one of the respondent's medical officers on November 1, 1971, and because Mr. Sullivan had not yet submitted a medical report which he promised on November 22, 1971, Mr. Sullivan's absence since November 23, 1971 was deemed a "resignation" pursuant to New York City Civil Service Commission Rule 6.4.6. *This letter was never delivered to Mr. Sullivan.*

Since Mr. Sullivan did not receive the letter he could not explain that he was too ill to keep the appointment on November 1st, or that the medical statement (which was subsequently submitted) was being delayed pending the completion of medical tests. Most importantly, however, Mr. Sullivan received no notice of this alleged "resignation," or the arbitrarily selected date thereof.

On March 14, 1972, having recovered his health, Mr. Sullivan applied for reinstatement. His application was denied by letter dated March 23, 1972.

At no time did Mr. Sullivan intend to resign or abandon his employment. However, his repeated attempts to be heard with respect to the reasons for his absence and to present supportive evidence that he had in fact informed the Agency of his condition were rebuffed.

Despite his incapacitated condition, Mr. Sullivan continually notified his department of his intention to return to work. Ample notification was given, both during and after the twenty day period prescribed in Rule 6.4.6., and Mr. Sullivan has maintained these proceedings in a continued effort to seek reinstatement and damages for the loss of earnings and stigma he has suffered due to respondent's strict enforcement of Section 6.4.6 and its absolute refusal to hear his position.

Mr. Sullivan has received no salary or compensation from the respondent whatsoever for any period subsequent to October 29, 1971. Mr. Sullivan is now fully capable of returning to his employment and performing his duties. Indeed, Mr. Sullivan, as a man in his 60's and a professional social services worker with no independent means of support, has no alternative but to continue to press for the return of his position.

A fair hearing and opportunity to be heard on the issue of whether he abandoned his employment was the first step toward this goal. Respondent, relying on Section 6.4.6 refused to take this step in what was an apparent attempt to "starve" Petitioner out.

On or about April 28, 1972, Mr. Sullivan commenced a proceeding pursuant to Art. 78, N.Y.C.P.L.R. seeking to review respondent's arbitrary determination resulting in the termination of his employment, without notice or an opportunity to be heard.

In his petition, Mr. Sullivan observed that he never intended to resign his employment, and had given full and timely notice of his illness to the respondent. He contended,

> "that the failure of the Department of Social Services to reinstate petitioner to his job as of the date upon which he was certified able to return by competent medical authority is a violation of the Rules of the Civil Service Commission [and] a deprivation of petitioner's right of due process and of equal protection under law."

Mr. Sullivan noted that:

> "Petitioner was not served with written specific charges nor given a reasonable time to prepare any defense nor afforded a full and fair hearing, nor any hearing at all for that matter."

The Article 78 proceeding culminated in the decision of Justice Frank of the New York Supreme Court (App. Pp. A-4–A-6). Justice Frank concluded, in effect, that Mr. Sullivan had not been discharged pursuant to Rule 6.4.6, but that he had been discharged for alleged "misconduct," thereby avoiding the Constitutional issue and for the first time adding the wholly extraneous issue of "misconduct." Justice Frank ordered the respondent to convene a hearing pursuant to Section 75 of the Civil Service Law of New York.

At the time Petitioner had not been reinstated and, therefore, was not a person subject to "removal" under that statutory provision.

Petitioner demanded to be reinstated to his position, or receive his back pay, prior to the hearing. Respondent adamantly refused to do so. Instead, under threat of default judgment respondent served charges and specifications which included substantial allegations which were in no way related to the cause for his original discharge. The charges were framed in a vituperative manner apparently to assure his continued absence from City payrolls. He had now apparently raised substantial "due process" issues which struck at the heart of employer control and his continued presence would constitute a thorn in the side of respondent. Mr. Sullivan's case which had begun as a simple exercise of arbitrary power due to alleged absence had become a cause celebre and he had to be crushed.

The "charges" were served on April 28, 1973, thirteen months after Mr. Sullivan was certified as capable of returning to work.

Mr. Sullivan's counsel objected to the scope of the charges, in that they raised issues which were irrelevant to the Article 78 proceeding which resulted in the judgment directing a hearing. He asserted that the sole issue was whether Petitioner had abandoned his position pursuant to Section 6.4.6. and that no extraneous issues could be raised. Moreover, he asserted that since Mr. Sullivan had not been restored to his position prior to the convocation of the "Hearing," no Section 75 Hearing could take place because such hearings only had jurisdiction over permanent civil servants, and, until the matter of his alleged abandonment was resolved by a hearing and reinstatement, Mr. Sullivan could not be considered a permanent civil servant.

Respondent again acting in its cavalier manner, conducted a "hearing" in the absence of Mr. Sullivan's attorney. Evidence was introduced which was utterly unrelated to Mr. Sullivan's alleged "resignation" of November 23, 1971. It appears that the evidence differed in material respects from the specifications served on Mr. Sullivan. Nevertheless, by letter dated August 7, 1973, Mr. Sullivan's "dismissal" as caseworker, originally based on an alleged absence for more than twenty days without notification, but now based on alleged misconduct, was confirmed.

Mr. Sullivan promptly moved to make the determination of Justice Frank dated April 10, 1973, the final judgment in this matter. As stated in the moving affirmation of Mr. Sullivan's attorney:

"The United States and New York State Constitutions with their guarantees of due process and fair and equal treatment under law have become but illusory shields to this beleaguered petitioner."

Mr. Sullivan's motion was denied by Mr. Justice Gellinoff of the New York Supreme Court on June 5, 1973 and judgment was entered accordingly (App. p. A-9). By order entered on April 22, 1974, the Appellate Division, First Department, New York State Supreme Court, affirmed without opinion (App. p.A-12) and, on March 24, 1974, the New York State Court of Appeals affirmed on the grounds that Petitioner had, in fact, not been denied "due process" because he was ultimately given a "hearing." (App. p. A-13–A-14).

Petitioner, has throughout the proceedings, asserted that the procedures followed with respect to his termination denied him due process of law as guaranteed by the XIV Amendment to the Constitution. In his initial petition to the New York State Supreme Court in April, 1972, Mr. Sullivan noted that the procedures being followed denied him the due process of law guaranteed by the United States Constitution (App. pp. A-1–A-2) and asserted it again when he sought reinstatement and initiated the instant action in the New York State Supreme Court. (App. pp. A-7-A-8). Counsel for Petitioner continued to assert the constitutional issue in both the Appellate Division of the New York Supreme Court and before the New York Court of Appeals.

REASONS FOR GRANTING THE WRIT

IMPORTANT ISSUES INVOLVING AN INDIVIDUAL'S RIGHTS TO BE HEARD PRIOR TO BEING TERMINATED FROM PUBLIC EMPLOYMENT AS REQUIRED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION ARE RAISED IN THE INSTANT WRIT.

Section 6.4.6 of the New York City Civil Service Commission Rules and Regulations places New York City Civil Servants in a position wherein they may lose their means of making a livelihood without being accorded a hearing or the most elementary aspects of due process of law as guaranteed in the XIV amendment to the Constitution. It is clear that the Section

both on its face, and in the manner in which it was applied, denies petitioner due process of law.

This Court has held, on numerous occasions, that, as a permanent appointee in the competitive classified civil service, an individual has a property right in his employment, and, such right may not be denied him absent according the individual the elementary rights required by the due process clause of the XIV amendment to the Constitution. *Regents* v. *Roth*, 408 U.S. 564 (1972); *Perry* v. *Sindermann*, 408 U.S. 593, 603 (1972); *Slochower* v. *Board of Education*, 350 U.S. 551 (1956); *Wieman* v. *Updegraff*, 344 U.S. 183 (1952).See also *Balash* v. *N.Y.C. Employee's Retirement System*, 34 N.Y. 2d 654 (1974). The "...constitutional protection...extend(s) to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Wieman* v. *Updegraff*, 343 U.S. 183, 192.

Once it is established that a person has a property right in his civil service position it becomes apparent that the individual in question is entitled to a hearing. "When protected interests are implicated, the right to some kind of prior hearing is paramount." *Regents* v. *Roth supra*, at 569. See also *Fuentes* v. *Shevin*, 407 U.S. 67, 82 (1972); *Bell* v. *Burson*, 402 U.S. 535 (1971); *Boddie* v. *Connecticut*, 401 U.S. 371, (1971); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). It is the only manner in which an individual can be protected against the arbitrary actions of the State. *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U.S. 292 (1937).

A hearing must take place, except in cases involving an unusual emergency, prior to the action which deprives the individual of a property right to meet the standards of due process. *Regents* v. *Roth supra*, *Bell* v. *Burson*, *supra* at 542.

The XIV Amendment requires that the hearing be held "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). And, where, as in the instant matter, the individual who seeks the hearing lacks independent resources, the necessity for a pre-termination hearing becomes essential. For, absent a pre-termination hearing, his need to concentrate on staying alive may in fact serve to deprive him of the ability to seek post-termination redress from a recalcitrant bureaucracy. See *Goldberg* v. *Kelly* supra at 262.

Moreover, only through the device of a fair hearing convened prior to the termination can petitioner avoid the stigma which

attaches thereto. An individual, under our constitutional system, has a basic right to forestall the "unsavory label" which may be publicly applied to him through bureaucratic caprice. See *Wisconsin* v. *Constantineau, supra* at 437. To provide a post-termination hearing is to attempt to remove a stigma which petitioner had no need to suffer. It is an attempt to provide half a loaf when an individual is entitled to the whole.

These propositions have been enunciated on numerous occasions. Thus, in *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, (1963), this court held that an applicant for admission to the New York State Bar was entitled to an opportunity to be heard to contest the basis of the charges against him before being denied admission to the bar; in *Schroeder* v. *City of New York*, 371 U.S. 208 (1962), this court held that due process required that an owner of property be given adequate notice and an opportunity to be heard *before* the City of New York could divert water from her property. See also Davis, 1 *Administrative Law Treatise*, section 7.02 at 412 (1958).

It is a basic tenant of our constitutional system that "...where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the governments case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene* v. *McElroy*, 360 U.S. 474, 496, (1959).

Thus it is clear that a civil service employee has certain minimal rights to his position which cannot be denied absent a substantive hearing. Such a hearing must be held prior to his removal. Section 6.4.6 of the New York City Civil Service Commission Rules and Regulations contains none of the procedural safeguards mandated by the Constitution. The Rule states:

> "When an employee absents himself without leave and fails to communicate with his department in the manner prescribed by his department for a period of twenty consecutive work days, such absence shall be deemed to constitute a resignation effective on the date of its commencement unless the appointing officer, in his discretion, sees fit to accept an explanation for such unauthorized absence."

Thus, on its face, the rule is constitutionally invalid because it provides no form of prior hearing. Under Section 6.4.6, contrary to this court's decision in *Greene* v. *McElroy; supra*, an

evidentiary conclusion is arrived at under circumstances wherein a person is being denied certain rights based on fact findings which have not been disclosed to the individual and which he has not had an opportunity to show are untrue. Due process does not permit such a "star chamber" proceeding. See *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio, supra.*

The Rule in question becomes even more offensive when it is viewed in light of New York Civil Service Law section 75 which creates an opportunity for a hearing for certain civil servants *prior* to discharge. Thus, in the City of New York there are two classes of permanent civil servants – those entitled to full procedural protection and those who are liable to summary removal. The distinction is not supported by any valid state interest, and results in a constitutionally invidious discrimination against a class of employees who are removed pursuant to Rules 6.4.6. Moreover it should be noted, under section 75, the burden of proving this conduct is on the person alleging the misconduct; while under Rule 6.4.6 an employee is "deemed" to have "resigned" – and thus the burden is on the employee to "satisfy" the appointing officer with an explanation. And, the employee faced with this enormous burden, is not presented with *any* opportunity to be heard.

Thus it is clear that Rule 6.4.6, is both unconstitutional on its face and in the manner in which it is enforced. This is so because the constitution requires that an employee be given the *opportunity* to participate in a hearing *before* his position is declared vacant. In the case at bar the petitioner was required to seek a remedy in the courts merely to have an opportunity to have his version of the occurrence heard and to hear the nature of the charges against him.

When he finally accomplished his goal he found himself placed in the position where, apparently because he had protested the unconstitutional activities of the City of New York, he was brought before a hearing panel which was convened, not to determine whether he had voluntarily abandoned his employment, but to determine other acts of misconduct which he had allegedly engaged in and which, prior to the institution of his proceeding in the New York State Supreme Court seeking the hearing guaranteed to him by the Due Process Clause of the XIV Amendment, he had never before been made aware of.

Respondent, in attempting to avoid the consequences of the

basic requirements of the XIV amendment of the Constitution, and in an attempt to avoid the direct attack which was obviously to be forthcoming against Rule 6.4.6, conducted a "hearing" pursuant to Civil Service Rule 75 some 13 months after terminating the petitioner. The hearing came at the direction of a justice of the New York State Supreme Court. Again, however, respondents were so intent on supporting their initial determination, that they conducted the hearings in a manner which itself continued and enforced the prior unconstitutional actions.

After being directed to hold the hearing, respondents created a procedure whereby petitioner would be "tried" pursuant to section 75 of the New York Civil Service Law. However, they refused to reinstate petitioner prior to the time that the hearing took place. Moreover, they leveled new and irrelevant charges against him in a transparent attempt to punish him further for asserting his constitutional privileges.

Section 75, on its face, provides that "A person holding a position by permanent appointment in the competitive class of the classified civil service" is subject to the jurisdiction of a panel created under Civil Service Law Section 75. Any individual subject to proceedings pursuant to Section 75 may not be suspended, without pay, for a period of more than 30 days.

In the instant proceeding, petitioner was terminated and had not received pay for over one year. Therefore, respondent was attempting to enforce a part of the statute (the hearing provision) and ignore the balance thereof (the thirty day limit on suspension).

What respondent was attempting to do was to avoid the dictates of due process not to comply with them. Its purpose was to go through a hollow hearing by using a statute which, for their own convenience, they had emasculated so that they might assert jurisdiction over petitioner and confirm their prior desire to discharge him.

In this regard, it should be particularly noted that while petitioner was originally discharged under Rule 6.4.6 *only* for failure to report to work during a specified period of time, when he was charged under the truncated aspects of Section 75 he was charged with numerous employment violations separate and apart from his failure to report. In fact, the decision to confirm

the prior ruling supporting the discharge was based not on his failure to report but on alleged acts of misconduct.

It is submitted that due process will not permit a governmental body to deprive an individual of a property right unless they have jurisdiction to make a decision with respect to his property right. In this case, since the petitioner had not been reinstated and had not been given his back pay, Section 75 of the New York Civil Service Law could not be applied. Petitioner was not a person holding a position of permanent employment in the competitive class of the classified civil service. Moreover, it could not be invoked because the petitioner had been suspended for in excess of 30 days without receiving any pay. Since the body in question had no jurisdiction to make a determination with respect to alleged misconduct that had taken place prior to petitioner's discharge, this body could not take away petitioner's property right. He had neither agreed, nor had the Respondent insisted, on any limitation on his right of employment nor had he agreed to accede to the jurisdiction of a Section 75 hearing in the circumstances under which it was convened. See *Arnett* v. *Kennedy*, 413 U.S. 134 (1974).

It was only through the improper assertion of jurisdiction over the petitioner that respondent attempted to avoid the direct and clear violations of the due process clause. When one dismisses the improperly invoked hearing, one is faced with the application of Rule 6.4.6 again. For, it was pursuant to Rule 6.4.6 that Mr. Sullivan was discharged. Under this rule, he was never accorded the right to a hearing during the course of which he could remove the stigma of discharge from his name and protect his rights. The sham that followed was merely a fiction created to give the trappings of due process without the substance.

One cannot use a fiction to avoid the requirements of the constitution.

It is for the above reasons that petitioner begs this court to accept the Writ of Certiorari. As previously noted, several hundred thousand employees of the City of New York, stand subject to loss of their property rights through the imposition of a rule which denies the elementary right to a hearing. Petitioner, standing alone, has fought for the right to be heard as to whether or not he in fact violated this rule. He has fought for the rights of every employee subjected to this tyranny. Only through this Court's intervention can these basic rights be preserved.

CONCLUSION

For the foregoing reasons, Brendan Sullivan, petitioner herein, respectfully prays that this petition for a Writ of Certiorari be granted.

June 18, 1975

Respectfully submitted,

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APPENDIX

EXCERPTS OF PETITION OF BRENDAN SULLIVAN VERIFIED APRIL, 1972

STATE OF NEW YORK
SUPREME COURT : NEW YORK COUNTY

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In the Matter of the Application

of

BRENDAN SULLIVAN,

Petitioner,

PETITION
Index No.

against

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK,

Respondent,

For an Order Under Article 78 of the Civil Practice Law & Rules.

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TO THE SUPREME COURT OF THE STATE OF NEW YORK

Petitioner, by MIRKIN, BARRE, SALTZSTEIN, GORDON & LEVINE, ESQS., his attorneys, respectfully shows and represents to this Court:

1. Petitioner, BRENDAN SULLIVAN, was employed since 1966 by the DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, the respondent herein, and has held the position of caseworker in the Competitive Classified Civil Service of the City of New York, and was employed at the Veteran Assistance Social Service Center Office (05) in the County and State of New York.

2. On October 26th, 1971, petitioner was stricken with severe illness, including the following symptoms: a severe diarrhea, nausea, nervous tremors and loss of weight, which symptoms, due to their intensity, thoroughly incapacitated petitioner and prevented him from pursuing his normal work patterns. On such date, petitioner immediately telephoned a co-worker in his office informing him of the nature of his illness and requesting that he communicate with the supervisor.

15. Respondent's determination to terminate Petitioner resulted from an error of law on the part of Respondent in that Respondent's authority, if any, to remove Petitioner flowed exclusively from Rule 6.4.6 of the Civil Service Rules which permits termination only under the strict language set forth in said rule. Inasmuch as Petitioner notified respondent through its agents, servants and employees, the Personnel Relations office, the Supervisor and the Director, all within the twenty day period, there was thus no absence for twenty consecutive work days without notice. Thus, respondent's termination of Petitioner was an error as a matter of law.

16. Respondent's determination was arbitrary and capricious in that it *inter alia* was made without the benefit of any information which could have been furnished by the Petitioner and any witnesses he may have produced in his behalf.

17. Respondent's determination constituted an abuse of discretion.

18. Respondent in terminating Petitioner without a hearing as provided in Sect. 75 of the Civil Service Law, proceeded without and in excess of its jurisdiction.

19. Respondent in terminating Petitioner arbitrarily, without a hearing or other elements of due process violated Petitioner's rights under the Fourteenth Amendment to the United States Constitution and under Article 1, Section 6 of the New York State Constitution.

20. Petitioner brings the instant application pursuant to Article 78 of the Civil Practice Law and Rules and within one hundred twenty (120) days of the date on which he received notice from the Respondent of his termination.

21. No previous application for the relief sought herein or for similar relief has been made.

WHEREFORE, Petitioner prays for a judgment ordering Caseworker and restore him upon the payroll of the Department

of Social Services, and to pay Petitioner the salary for such position from March 20th, 1972 to the time he is reinstated, and for such other and further relief as is just and proper, together with the costs and disbursements of this proceeding.

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(Duly Verified April 1972)

Opinion of Justice Frank

SUPREME COURT : NEW YORK COUNTY
INDIVIDUAL CALENDAR : PART IV

In the matter of

BRENDAN SULLIVAN

Petitioner

against Index No. 9496/72

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK,

Respondent,

For an order under Article 78 of the Civil Practice Law & Rules

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FRANK, J.:

This is an application pursuant to Article 78 of the CPLR for an order compelling the respondent to reinstate the petitioner to his position as caseworker or for alternative relief. Rule 6.4.6 of the Civil Service Commission provides that when an employee absents himself without leave and fails to communicate with his department in the manner prescribed by his department for a period of twenty consecutive work days, such absence shall be deemed to constitute a resignation effective on the date of its commencement unless the appointing officer, in his discretion, sees fit to accept an explanation for such unauthorized absence. Because of petitioner's alleged violation of the aforementioned rule, his absence for a twenty day period after November 23, 1971 was deemed by the respondent to constitute his "resignation" from his position of caseworker effective at 9:00 A.M. on that date.

Generally, an employee who is discharged from his governmental position without a hearing need not seek reinstatement

within four months from his discharge but he may delay until he has demanded reinstatement and has been refused. However, he may not unduly delay in seeking reinstatement since he may then be charged with laches (Austin v. Board of Higher Education, 5 N Y 2d 430, 442 [1959]; Matter of Burke v. Village of Johnson City, 36 A D 2d 202 [3rd Dept. 1971]; Matter of O'Buck v. City of Yonkers, 2 A D 2d 775 [2nd Dept. 1956]). In this proceeding, respondent contends that it mailed a letter dated December 23, 1971 to the petitioner to inform him that his absence was being deemed a "resignation." This letter was admittedly returned on January 13, 1973 in the original envelope, which had been marked "unclaimed" by the Post Office. An envelope that is marked "unclaimed" indicates that no notice was received by the defendant; furthermore, this postal mark does not carry the connotation that the failure to receive the envelope was due to any act of the defendant (cf. Grandison v. College Truck Renting Corp., 26 A D 2d 260 [1st Dept. 1966]) Thus, even if the allegations in the answer are accepted as true, the respondent did not actually inform the petitioner that he was deemed to have resigned until Dorothy L. Omansky, a Personnel Director of the respondent, informed him of that fact over the telephone or or about March 28, 1972. In any event, the documentation would tend to indicate that the petitioner's demand for reinstatement was not refused until early April, 1972. Under these circumstances, this procedure must be considered timely under CPLR §217 since it is made within four months after respondent's written refusal to reinstate the petitioner.

Under the Civil Service Law § 75, subd. 1(a), a person, who holds a position by permanent appointment in the competitive class of the classified civil service, shall not be removed or otherwise subjected to any disciplinary penalty except for incompetency or misconduct shown after a hearing upon stated charges. There is authority for the proposition that a petitioner, who is deemed to have resigned for his unauthorized absences, is not later entitled to a fair hearing under Section 75 of the Civil Service Law. (Matter of Dunn v. Simon, 16 A D 2d 719 [3rd Dept. 1962]). On the other hand, such a petitioner has been accorded a hearing upon charges (Matter of Hayward v. Cornelius, 30 A D 2d 901 [3rd Dept. 1968]). However, it would appear to this Court that, even though a petitioner is being removed from the civil service through a device denominated a "resignation," the latter is, in fact, being discharged from employment for alleged misconduct upon his part. Therefore, a

caseworker in the competitive classified Civil Service of the City of New York, such as the present petitioner should be accorded a fair hearing under the Civil Service Law.

Accordingly, the application is granted only to the extent of remanding this matter to afford the petitioner a fair hearing as is provided for in Section 75 of the Civil Service Law.

Settle judgment.

Dated: July 7, 1972.

J.S.C.

EXCERPTS OF VERITIFED PETITION DATED MARCH 23, 1973

STATE OF NEW YORK
SUPREME COURT : NEW YORK COUNTY

----------x

In the Matter of the Application

of

BRENDAN SULLIVAN,

Petitioner

against

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK,

Respondent

VERIFIED PETITION
Index No. 9496/72

For an Order under Article 78 of the Civil Practice Law & Rules.

----------x

TO THE SUPREME COURT OF THE STATE OF NEW YORK

Petitioner, by MIRKIN, BARRE, SALTZSTEIN, GORDON & LEVINE, ESQS., his attorneys respectfully shows and represents to this Court:

1. Petitioner, BRENDAN SULLIVAN, was employed since 1966 by the DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, the Respondent herein, and has held the position of caseworker in the Competitive Classified Civil Service of the City of New York, and was employed at the Veteran Assistance Social Service Center Office (05) in the County and State of New York.

2. From approximately October 16, 1971, to on or about March 20, 1972, Petitioner was stricken with severe illness and received medical care and treatment therefor during said period of time.

13. Respondent has refused to reinstate the Petitioner, has refused to pay him back pay, and has refused to calendar a hearing, all in direct and flagrant contradiction of the pertinent law of the State of New York and the law of this case.

14. Petitioner is in dire economic straits and it is realistic to assume that he is in imminent danger of becoming a public charge. Respondent's original determination and subsequent conduct has been arbitrary, capricious, an abuse of discretion, an abuse of legal process, a violation of the laws of the State of New York and a violation of due process clauses of the Fourteenth Amendment to the Constitution of the United States and Article 1, Section 6 of the New York State Constitution.

15. Petitioner brings the instant application pursuant to Article 78 of the Civil Practice Law and Rules and respectfullly seeks *immediate* reinstatement to his position as caseworker and restoration upon the payroll of the DEPARTMENT OF SOCIAL SERVICES as well as back salary and all benefits due and owing to him from March 20, 1972, to the time such reinstatement is effective.

16. No previous application for the relief sought herein or for similar relief has been made except for the original petition submitted herewith as Petitioner's Exhibit 1.

WHEREFORE, Petitioner prays for a Judgment ordering the Respondent to reinstate Petitioner forthwith to his position as caseworker and restore him upon the payroll of the DEPARTMENT OF SOCIAL SERVICES, and to pay Petitioner the salary for such position from March 20, 1972, to the time he is reinstated with the interest due and owing thereon and to restore to Petitioner any accrued benefits on the grounds that Respondent is in flagrant violation of the maximum suspension period pending determination of charges set forth in Section 75 of the Civil Service Law of the State of New York, and for such other and further relief as is just and proper, together with the costs and disbursements of this proceeding.

Dated: Great Neck, New York
March 23, 1973.

MIRKIN, BARRE, SALTZSTEIN,
GORDON & LEVINE, P.C.
Attorneys for Petitioner
Office & P.O. Address
98 Cutter Mill Road
Great Neck, New York 11021
(212) 895-7160

(Duly verified March 1973)

Opinion of Justice Gellinoff, dated June 5, 1973

SUPREME COURT : NEW YORK COUNTY
INDIVIDUAL CALENDAR : PART IV

In the Matter of the Application

of

BRENDAN SULLIVAN,

Petitioner,

against

Index No.
9496/1972

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK,

Respondent,

For an Order under Article 78 of the Civil Practice Law and Rules.

GELLINOFF, J.:

By decision dated April 10, 1973, this court granted petitioner's application for relief pursuant to Article 78, unless respondent conducted the fair hearing previously mandated. Petitioner now moves to make that determination the final judgment in this matter, claiming that the hearing conducted by respondent did not comply with the previous orders.

The application is denied. The fact that in conducting a hearing pursuant to Section 75 of the Civil Service Law – as had been directed – respondent chose to enlarge the scope of charges beyond that previously relied upon in discharging petitioner, does not render the proceedings improper. Petitioner was given ample notice of the charges prior to the hearing.

Additionally, nothing in the statute nor in the previous decisions in this case required respondent to reinstate petitioner prior to conducting the hearing, as was urged by petitioner's counsel prior to his withdrawal from the hearing.

Settle order.

Dated: June 5, 1973

J.S.C.

Order of Affirmance

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 22, 1974.

Present—
Hon. Arthur Markewich,
Justice Presiding,
" Francis T. Murphy, Jr.,
" Aron Steuer,
" George Tilzer,
" Louis J. Capozzoli,
Justices.

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—o—

Brendan Sullivan,
Petitioner-Appellant,
against

Department of Social Services of the City of New York,
Respondent-Respondent.

—o—

An appeal having been taken to this Court by the petitioner-appellant from a judgment of the Supreme Court, New York County (Gellinoff, J.), entered on October 9, 1973, denying petitioner's application and dismissing the petition, and said appeal having been argued by Mr. David J. Agatstein of counsel for the appellant, and by Mr.

Order of Affirmance

Francis F. Caputo of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein.

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed, without costs and without disbursements, and without prejudice to such plenary action as petitioner may be advised to pursue in respect of a claim for back pay.

Enter:

Hyman W. Gamso
Clerk

Memorandum Decision

MARKEWICH, *J.P.*, MURPHY, STEUER, TILZER, CAPOZZOLI, *JJ.*

579

———o———

BRENDAN SULLIVAN,
Petitioner-Appellant,
D. J. Agatstein,
against

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK,
Respondent-Respondent,
F. F. Caputo.

———o———

Judgment, Supreme Court, New York County (GELLINOFF, *J.*), entered October 9, 1973, denying petitioner's application and dismissing the petition, unanimously affirmed, without costs and without disbursements. Our affirmance is without prejudice to such plenary action as petitioner may be advised to pursue in respect of a claim for back pay.

Order filed.

STATE OF NEW YORK

COURT OF APPEALS

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

1 No. 119

BRENDAN SULLIVAN,

Appellant

vs.

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK,

Respondent.

MEMORANDUM

By a letter dated December 23, 1971 respondent attempted to notify appellant that, pursuant to Rule 6.4.6 of the Rules of the City Civil Service Commission of the City of New York, his absence since November 23, 1971 was deemed to constitute a resignation from his position of caseworker. In an article 78 proceeding seeking reinstatement and restoration to payroll, a judgment was made at a Special Term on January 11, 1973 granting the application "only to the extent that this matter be remanded to Respondent, for a full and fair hearing as provided for in Section 75 of the Civil Service Law." No appeal was taken therefrom and negotiations between the parties were not consummated in settlement. In a second article 78 proceeding, an order was entered April 11, 1973 granting appellant's petition unless within ten days after service respondent conducted the fair hearing mandated by the "order" of January 11, 1973. Thereafter charges and specifications, setting forth alleged excessive lateness and excessive absences by appellant in violation of department rules and regulations, as well as having "absented himself from October 16, 1971 to March 9, without authoriza-

tion and without presenting medical statements required by departmental procedures" (sic), were served upon appellant, together with notice of a hearing.

In order to comply with the court order and with the provisions of section 75 of the Civil Service Law, respondent necessarily gave to appellant written notice of the proposed removal or other disciplinary action, as well as the reasons therefor, and furnished him with a copy of the charges preferred. The hearing was conducted 13 days after said notice and service. There has been now showing that appellant was deprived of a fair hearing (see *Matter of Sowa* v. *Looney*, 23 N Y 2d 329, 333-334), and there was no error in proceeding with the hearing in the absence of appellant and his counsel, after counsel claimed lack of jurisdiction and then refused to participate *(Matter of Grottano* v. *Kennedy*, 5 N Y 2d 381, 388-389). Since respondent's determination sustaining the charges was supported by substantial evidence and since the penalty of dismissal as imposed was not in excess of jursidiction, in violation of lawful procedure, arbitrary or in abuse of discretionary power, there was no alternative but to confirm *(Matter of Pell* v. *Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Memaroneck, Westchester County*, 34 N Y 2d 222, 231).

The order of the Appellate Division, made without prejudice to such plenary action as petitioner may be advised to pursue in respect to his claim for back pay, should be affirmed, with costs.

* * * * *

Order affirmed, with costs, in a memorandum. All concur.

Decided March 24, 1975

(42215)

Supreme Court, U. S.
FILED
JUL 17 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1620

BRENDAN SULLIVAN,
Petitioner,

—against—

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1620

BRENDAN SULLIVAN,

Petitioner,

—against—

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Statement of the Case

The petitioner, Brendan Sullivan, was employed by the respondent on February 7, 1966, in the title of caseworker, a competitive civil service position (15).*

* Numbers in parentheses refer to pages in the Record on Appeal submitted by petitioner (there appellant) to the New York Court of Appeals.

Beginning on October 26, 1971, petitioner was absent from work. By letter dated December 23, 1971, respondent attempted to notify petitioner that, pursuant to Rule 6.4.6 of the New York City Civil Service Commission, his absence since November 23 was deemed to constitute a resignation from his position (27). This letter was sent by certified mail, return receipt requested. It was returned on January 13, 1972, marked, "unclaimed", although the Post Office made four attempts to deliver it and left a notice at petitioner's address (28). When petitioner subsequently requested reinstatement to his position in March of 1972, the request was denied by respondent.

On April 28, 1972, petitioner commenced a proceeding under Article 78 of the New York CPLR to review respondent's determination that he had resigned pursuant to Rule 6.4.6, and for related relief.

On January 11, 1973, a judgment was entered in this proceeding signed by Mr. Justice Frank of the New York Supreme Court granting petitioner's application "only to the extent that this matter is remanded to respondent, for a full and fair hearing as provided for in Section 75 of the Civil Service Law" (99). In an accompanying opinion, Mr. Justice Frank stated that "even though a petitioner is being removed from the civil service through a device denominated a 'resignation', the latter is, in fact, being discharged from employment for alleged misconduct upon his part" (37). This judgment was not appealed by either party.

Unsuccessful settlement negotiations followed. Petitioner then commenced another Article 78 proceeding demanding the same relief requested in his first proceeding. This proceeding resulted in the order of Justice Gellinoff, dated April 11, 1973, which conditionally granted

the petition unless within ten days respondent conducted the hearing mandated by the order of Justice Frank (49).

Pursuant to this order, respondent caused charges and specifications to be served on petitioner. These charges and specifications set forth alleged excessive latenesses and excessive absences by petitioner in violation of departmental rules and regulations, and alleged that petitioner "absented himself from October 16, 1971 to March 9, 1972 without authorization . . ." (54).

A hearing was held on May 11, 1973. Petitioner's attorney made a "special appearance" to contest the jurisdiction of the respondent to hold the hearing, and then left the hearing. The basis of petitioner's jurisdictional objection was the fact that he was then not on the respondent's payroll. The hearing proceeded in the absence of the petitioner and his attorney.

Every facet of respondent's case was proven by documentary proof and testimony of disinterested senior employees. Petitioner's personnel records were introduced into evidence and interpreted by an expert witness. These records indicated petitioner's absences and latenesses during the period covered in the specifications (74-76). Proof was submitted that petitioner had not tendered a medical statement to respondent until after four and one-half months of absence, contrary to department rule (78).

The Hearing Officer found that all the specifications were established and recommended dismissal. By order of the Commissioner, petitioner was dismissed from the Department.

Petitioner then moved to make the previous order of Justice Gellinoff the final judgment in this matter, claiming that the hearing conducted by respondent did not

comply with the previous orders of the Court. This application was denied by Justice Gellinoff and the petition dismissed by an order and judgment dated October 3, 1973. The New York Appellate Division, First Department, unanimously affirmed the judgment "without prejudice to such plenary action as petitioner may be advised to pursue in respect of a claim for back pay." 44 AD2d 672. The New York Court of Appeals unanimously affirmed the order of the Appellate Division, holding that there had been "no showing that appellant was deprived of a fair hearing . . .". This decision is reported at 36 NY2d 766.

ARGUMENT

Petitioner has received a fair hearing. The evidence at the hearing fully supported the respondent's decision to dismiss petitioner. Due process did not require that petitioner be restored to respondent's payroll prior to the commencement of the disciplinary hearing.

Petitioner's first claim is that Rule 6.4.6 of the Rules and Regulations of the New York City Civil Service Commission is constitutionally invalid because it does not provide for a hearing prior to a determination that an employee has resigned his position. Petitioner raised this claim in the New York courts and was successful. The order of Justice Frank, and the subsequent order of Justice Gellinoff, directed that petitioner be served with written charges and specifications of misconduct and that he be afforded a hearing as prescribed by Civil Service Law Section 75. Implict in these orders is the determination that respondent's application of Rule 6.4.6 to petitioner was a nullity. Under these circumstances, we submit that the constitutionality of this rule is not properly before this Court.

In order to comply with the two court orders and with the provisions of Section 75, respondent gave to petitioner written notice of the proposed disciplinary action and a copy of the charges preferred. Petitioner has not demonstrated why respondent should have been bound to prefer only charges related to petitioner's unauthorized absence beginning on October 26, 1971. The additional charges preferred related to petitioner's excessive lateness and other absences. As a matter of New York law, such charges were entirely proper.

The respondent clearly had jurisdiction to hold the hearing based on the orders of the New York courts that had been obtained by petitioner. Furthermore, Section 75 of the Civil Service Law does not require that an employee be reinstated to his position before a hearing can be conducted. Subdivision (3) of Section 75 limits suspension without pay to a period not exceeding 30 days, but it does not prohibit suspension for a longer period, nor does it mandate reinstatement after such period, if the charges are not yet determined. *Matter of Amkraut* v. *Hults*, 21 AD2d 260, 263 (1st Dept., 1964), aff'd 15 NY2d 627 (1964). Petitioner's claim for damages for the period before the hearing when he was not allowed to work has been expressly left open by the New York courts.

As we read this Court's decision in *Arnett* v. *Kennedy*, 413 U.S. 134 (1974), petitioner was not entitled, as a matter of due process, to be restored to respondent's payroll before he could be tried at a disciplinary hearing.

In sum, petitioner has already been granted by the New York courts the relief he is requesting here, to wit, an opportunity for a full trial-type hearing prior to his termination from service. The question of damages for delay in bringing the charges is still open in New York and petitioner may raise this issue in a separate action.

CONCLUSION

The petition for a writ of certiorari should be denied.

July 15, 1975.

Respectfully submitted,

W. Bernard Richland,
Corporation Counsel of the City of New York,
Attorney for Respondent.

L. Kevin Sheridan,
Francis F. Caputo,
of Counsel.